FILED
MAY 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1515

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, ACTING THROUGH THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

RAINIER VIEW ASSOCIATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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Respondents' brief in opposition advances several arguments in an attempt to justify the judgment of the court of appeals, but we have addressed each of those arguments in our petition. What is noteworthy about the brief in opposition is what it does *not* say. Respondents do not deny that this case is worthy of review by this Court. To the contrary, they go so far as to advocate (in the alternative) that the Court grant certiorari and summarily affirm. Br. in Opp. 20. We agree with respondents that a grant of certiorari is appropriate and that the merits are so clear that the Court may wish to consider a summary disposition. For the reasons given in the petition, however, it is a summary reversal, rather than a summary affirmance, that would be in order.

Most strikingly absent from the brief in opposition is any effort to square respondents' position with the fact that Section 1.9d of the form contracts at issue is, by its explicit terms, an "overall limitation" that is to be applied "[n]otwithstanding any other provisions of this Contract." Respondents do *not* contend that Section 8(c)(2) of the Housing Act of 1937, 42 U.S.C. 1437f(c)(2), in any way prevents HUD from adopting, by contract, such an overall limitation. Indeed, they even "agree with HUD that the *statute* left it to HUD to determine how to avoid improper adjustments." Br. in Opp. 11. Respondents simply assert that, "in the *contract,* [HUD] *did* determine how improper adjustments were to be avoided—[solely] by monitoring and adjusting the factors." *Ibid.* Yet respondents make no effort whatever to identify the precise contractual language that limits HUD to avoiding noncomparable rents through revisions in the AAAFs—and indeed there is no such language.

Section 1.9d provides that "adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government." That language must, as respondents concede, authorize *some* method for the government to eliminate material differences in rents for comparable assisted and unassisted units.[1] Further-

[1] Citing a 1980 internal HUD memorandum, respondents apparently claim (Br. in Opp. 7) that HUD itself previously took the position that the *only* possible way to implement the "overall limitation" would be to limit the AAAFs on the basis of a random sampling of rents. The memorandum does suggest that as *one* way to implement the overall limitation, but the very passage that respondents quote also says that "[t]his *or another system* * * * must be established." *Section 8 Rent Adjustments, Elderly Housing, and Other Assisted Housing Issues: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs,*

more, nothing in that language can possibly be construed—nor do respondents even contend that anything in that langage can be construed—to *forbid* case-by-case studies to determine whether the congressionally mandated comparability in fact exists.[2] The absence of any

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98th Cong., 2d Sess. 68 (1984) (emphasis added) [hereinafter *1984 Hearing*]. HUD chose to establish another system, which it began enforcing in 1981, and nothing in the statute or the contracts precludes that system. In this regard, we note that there is no merit whatever to respondents' assertion (Br. in Opp. 6-7, 14) that HUD's inactivity in enforcing the comparability mandate before 1981 reflects HUD's "interpretation" of the statute and contracts and that that "interpretation" is inconsistent with HUD's present interpretation. It is well established that "[a]uthority actually granted by Congress of course cannot evaporate through lack of administrative exercise." *United States* v. *American Union Transport, Inc.*, 327 U.S. 437, 455 n.18 (1946) (quoting *FTC* v. *Bunte Brothers*, 312 U.S. 349, 352 (1941)); see also *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 590 (1957) (FTC's failure for 35 years to invoke Clayton Act against vertical acquisitions "is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the Act"); *Baltimore & O. Ry.* v. *Jackson*, 353 U.S. 325, 331 (1957).

[2] Respondents do argue that what Section 1.9d *authorizes* is something other than case-by-case studies. They say that what HUD preserved with the overall limitation was "the right to determine, monitor and adjust the factors to avoid material differences." Br. in Opp. 10. Their argument is wrong for two reasons. First, it has no support whatever in the language of Section 1.9d or its statutory analog, 42 U.S.C. 1437f(c)(2)(C), neither of which refers to "factors" or "formulas," let alone states that revision of such "factors" or "formulas" is the exclusive permissible means for implementing the comparability limitation. Second, HUD already has the power that respondents claim Section 1.9d was designed to preserve: Section 1.9b(1) provides that the AAAFs will be "determined by the Government," and that "interim revisions may be made as market conditions warrant." (It is that provision and HUD's general authority to determine "a reasonable formula," not the overall limitation in Section 1.9d, that is reflected in the limited use of market data in the appen-

argument as to why Section 1.9d forbids individual comparability studies is dispositive, since Section 1.9d applies "[n]otwithstanding any other provisions of this Contract." Whatever gloss one might place on *Section 1.9b* in the absence of that language, Section 1.9d expressly precludes trumping the comparability mandate with any such gloss. The judgment of the court of appeals is plainly wrong for that simple reason, as to which respondents have no answer.

The subsequent legislative developments discussed in our petition serve only as further support for the obviously correct resolution of this case. We rely on statutory amendments passed by both houses of Congress and signed by the President that unquestionably assume that comparability studies *can* be used to depart from the rent increases that would result from application of the AAAFs. The amended statute provides that, "[i]f the Secretary or appropriate State agency does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied." See Pet. 24. Respondents concede that, "[a]s stated by HUD, the amendment does assume that a 'comparability study' can be used to limit the factors." Br. in Opp. 17. They then seek to avoid the significance of that concession by claiming that "the comparability study would [have to] be used to make an interim revision to the factor that would otherwise apply." *Ibid.* But the statutory language cannot

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dices to the brief in opposition. Respondents are wrong in asserting that, "from the inception of the program, HUD has implemented the overall limitation in determining the factors." Br. in Opp. 7.) Respondents' reading of Section 1.9d would thus render it a nullity.

possibly be read as respondents would read it. Respondents' position is that Congress meant for AAAFs to be applied *in all cases*, with the only consequence of timely performance of a comparability study being that revised AAAFs may be applied in place of the original AAAFs. The amended statute, however, expressly commands application of AAAFs only as the *alternative* to timely preparation of a comparability study.[3]

Moreover, in stark contrast to our reliance on *statutory* language that strongly supports our position, respondents' position seeks support in the statements of a mere congressional committee. Br. in Opp. 15-18. And those statements do not even bear on, much less "flatly contradict[,] HUD's ratification argument," *id.* at 18, for they address the question whether HUD may *reduce* rents by the use of comparability studies. It is undisputed that Congress by the 1988 amendments intended to bar HUD in the future from continuing to reduce rents below prior approved rent levels, but that is not the question before the Court. Rather, the issue at bar is whether HUD may *limit or deny rent increases* by the use of such studies.[4] The Ninth Cir-

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[3] We need not guess what Congress meant by allowing a "comparability study" (also known as a "comparability analysis" or "comparability review") to be used. Congress had known for years before it enacted the 1988 amendments how HUD was using comparability reviews in the Section 8 rent adjustment process, *i.e.*, to carry out the statutory and contractual "overall" comparability limitation by capping AAAF rent increases, the very practice challenged in this case. See *1984 Hearing* 99, 130, 132, 150.

[4] In addition, the statements that respondents quote from H.R. Rep. No. 741, 100th Cong., 2d Sess. (1988), are directed very specifically at the issue of HUD's compliance with an amendment forbidding rent reductions *after April 15, 1987*, not at the question whether HUD had authority before 1987 to cut rents. As we observed in our petition, there has concededly been some congressional displeasure at some features of HUD's administration of the Section 8

cuit has held that HUD lacks statutory and contractual authority to do *either* thing, but *Congress* has never said anything of the kind.[5]

Finally, nothing in the brief in opposition negates in any way our showing that the Ninth Circuit's decision presents a question of public importance. Although respondents point out that Section 8 tenants pay a fixed amount of rent, regardless of whether HUD allows a rent increase (Br. in Opp. 18), that does not affect our point that *someone* must bear the multimillion-dollar brunt of the Ninth Circuit's erroneous decision if it is allowed to stand. The money to pay Section 8 landlords above-market rents either would have to come from money already appropriated for HUD's programs, and thus potentially be diverted from low-income tenants other than present Section 8 tenants, or else would have to come from a new appropriation, and thus be borne by federal taxpayers. There is absolutely no reason in law, equity, or public policy why either group should have to subsidize respondents' and other landlords' above-market rents.

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program, but no statement by any member or committee of Congress that respondent has cited corresponds at all to the holding of the Ninth Circuit in this case.

[5] To be sure, we would contend, contrary to the comments of the House Committee on Banking, Finance and Urban Affairs, that nothing in pre-1988 law required that "rents for project-based assisted projects would be reduced only if the published [AAAF] was negative." H.R. Rep. No. 122, 100th Cong., 1st Sess. 32 (1987). But this Court need not reach that issue in order to reverse the judgment below.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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MAY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00235